



## Report to the Auburn City Council

|                          |
|--------------------------|
| Action Item              |
| Agenda Item No. <b>8</b> |
| City Manager's Approval  |

|                 |  |
|-----------------|--|
| <b>To:</b>      | Mayor and City Council Members                               |
| <b>From:</b>    | Bernie Schroeder, Director of Public Works                   |
| <b>Date:</b>    | December 9, 2013   |
| <b>Subject:</b> | Safe Routes to School – Palm Avenue Sidewalk Project - Award |

### The Issue

Shall the City of Auburn award the Safe Routes to School – Palm Avenue Sidewalk Project to the lowest responsive bidder?

### Conclusions and Recommendation

Staff recommends that the City Council first consider the formal protest from Hansen Bros., as well as all communications and information from the apparent low bidder, and then **BY RESOLUTION**, authorize the Director of Public Works to execute a construction contract with Sierra Nevada Construction, Inc. for the Safe Routes to School – Palm Avenue Sidewalk Project in an amount not to exceed \$1,494,907.70 and amend the budget for the Palm Avenue Sidewalk Project to appropriate \$100,000 in Highway 49 Mitigation Funds and \$175,631 in Local Transportation Funds in the Transportation Fund.

### Background

The Safe Routes to School – Palm Avenue Sidewalk Project includes implementation of approximately 1300 feet of eight (8) foot wide sidewalk along the South side of Palm Avenue. This project includes retaining walls to support the sidewalk, relocation of existing utilities, and a dedicated turn lane into the E.V. Cain School. The ROW has been increased to 40 feet allowing for a four-foot planter buffer between the edge of pavement and sidewalk.

On May 13, 2013 the City Council authorized permission to advertise the project and on November 7, 2013 there was a bid opening. The Safe Routes to School – Palm Avenue Sidewalk Project received nine bids. The bidders are as follows:

| Bidder                            | Located          | Bid Amount     |
|-----------------------------------|------------------|----------------|
| -Sierra Nevada Construction, Inc. | Sparks, NV       | \$1,359,007.00 |
| -Hansen Bros. Enterprise          | Grass Valley, CA | \$1,441,000.00 |
| -B&M Builders, Inc.               | Folsom, CA       | \$1,448,084.00 |
| -Western Engineering, Inc.        | Loomis, CA       | \$1,588,726.00 |
| -Burdick Excavating               | Carson City, NV  | \$1,654,000.00 |
| -Gabe Mendez, Inc.                | Newcastle, CA    | \$1,734,952.55 |
| -Westcon Construction             | Newcastle, CA    | \$1,824,372.25 |
| -Knife River Construction         | Marysville, CA   | \$1,900,930.10 |
| -Koch & Koch, Inc.                | Penn Valley, CA  | \$1,915,908.00 |

All of the bids have been reviewed and Sierra Nevada Construction, Inc. is considered the lowest responsible bidder.

Construction is anticipated to start in the beginning of December, 2013 with construction completion by the end of April, 2014.

### **Bid Protest**

On November 25, prior to the last Council Meeting, Hansen Bros. sent a formal protest letter to the City, alleging that Sierra Nevada Construction had submitted a non-responsive bid and should be disqualified. Specifically, Hansen Bros. noted that Sierra Nevada Construction had not specified a subcontractor who specializes in Traffic Control to perform that aspect of the work.

Staff interprets the construction contract to require a specially licensed subcontractor only if the general contractor is not self-performing that work, or is somehow not qualified to do the work. In this instance, Sierra Nevada Construction appears from the face of the bid to be both qualified to perform the work and intending to self-perform. Therefore, staff recommends that the Council decline to accept the allegations in the bid protest, and award the contract to the lowest responsible and responsive bidder.

### **Alternatives Available to Council; Implications of Alternatives**

1. Accept staff recommendations.
2. Find that Sierra Nevada Construction is non-responsive and award the contract to the next lowest bidder.
3. Take no action.

### **Fiscal Impact**

The approved FY 2013/14 Budget incorporates the Palm Avenue Sidewalk Project as a Capital Project in the Transportation Budget (Fund 26). To fully fund the Palm Avenue Sidewalk Project staff is requesting a budget amendment to appropriate an additional \$100,000 in Highway 49 Mitigation Funds and \$175,631 from the Local Transportation Fund. The maintain a balanced budget in the Transportation Fund; the Annual Road Overlay Project will be decreased by \$175,631 to allow for the budget adjustment for the Palm Avenue Sidewalk Project. Sierra Nevada Construction, Inc. submitted a bid for this project of \$1,359, 007; however, pursuant to Resolution 92-50, the City Council shall award Capitol Projects based on the lowest responsible bidder plus a 10% contingency. Therefore the total award amount including the contingency shall not exceed the amount of \$1,494,907.70.

The total project costs for the projects are as follows:

|   |                           |
|---|---------------------------|
| <b>Construction Phase Consultant Costs</b>        | <b>\$74,802</b>           |
| <b>City of Auburn Staff Allocation (estimate)</b> | <b>\$50,000</b>           |
| <b><u>Construction Award</u></b>                  | <b><u>\$1,494,908</u></b> |
| <b>Total</b>                                      | <b>\$1,619,710</b>        |

The majority of the funding for this phase of the project are federal funds that are administered by the State of California Department of Transportation under the Federal Safe Routes to School program as well as Congestion Mitigation Air Quality (CMAQ) funding. Following is a breakdown of the funding:

|  |                        |
|--|------------------------|
| <b>CMAQ – Congestion Mitigation Air Quality</b>                  | <b>\$102,033</b>       |
| <b>Federal Safe Routes to School Program</b>                     | <b>\$781,579</b>       |
| <b>Highway 49 Traffic Mitigation Fund</b>                        | <b>\$431,388</b>       |
| <b>Reimbursement from PCWA</b>                                   | <b>\$79,430</b>        |
| <b>Local Transportation Fund</b>                                 | <b>\$175,631</b>       |
| <b><u>Local Transportation Fund Bicycle &amp; Pedestrian</u></b> | <b><u>\$49,649</u></b> |
| <b>Total</b>   | <b>\$1,619,710</b>     |

***Attachments:***

Bid Protest Letter from Hansen Bros. Dated November 25, 2013

Response Letter from Sierra Nevada Construction. Dated November 25, 2013

Response to Bid Protest from SNC Attorney Diepenbrock Elkin LLC Dated December 2, 2013

Response to Hanson Bros to Protest from City DPW Dated December 2, 2013

Reply Letter from Hansen Bros. Dated December 3, 2013

Response Letter from Sierra Nevada Construction Attorney Diepenbrock Elkin LLC Dated Dec. 4, 2013

Project Schedule

Resolution to Award

GENERAL ENGINEERING CONTRACTOR  
CSL# 207705  
Residential & Commercial Site Development  
Quality Aggregates & Ready Mixed Concrete  
HBE Equipment Rentals ▪ Sales ▪ Service  
Landscape & Masonry Products  
U-Cart Concrete



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(530) 272-5401 – Main Office Fax  
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November 25, 2013

Bernie Schroeder  
Director of Public Works  
City of Auburn  
1225 Lincoln Way  
Auburn, CA 95603

RE: BID PROTEST  
Project: Palm Ave. Safe Routes to School  
Bid Date November 7, 2013

Ms. Schroeder,

Please consider this letter to be a formal protest of the bid submitted by Sierra Nevada Construction in connection with The Palm Ave. Safe Routes to School project. Sierra Nevada Construction is non-responsive and therefore must be rejected based on the City's bidding requirements.

Sierra Nevada Construction is incapable of self performing the traffic control required to properly complete the job. They failed to list a traffic control sub-contractor and therefore would be out of compliance with bidding and contract requirements. Per the Standard Specifications provided, section 7-10.1 Traffic and Access, clearly states "All traffic control on the project shall be implemented by a sub-contractor who specializes in Traffic Control and is approved by the Public Works Director and/or Engineer." According to the Standard Specifications you may not self perform this item of the project and even if Sierra Nevada Construction was going to self perform they do not hold the proper license. Sierra Nevada Construction holds a class A license in California and not the C31, Construction Zone Traffic Control, required.

We feel that due to the information provided above that Sierra Nevada Construction should be found as non-responsive and the contract should be awarded to the next responsible bidder.

Sincerely,

*Jeff Hansen*

Jeff Hansen



November 25, 2013

Bernie Schroeder  
Director of Public Works  
City of Auburn  
1225 Lincoln Way  
Auburn, CA 95603

RE: Palm Avenue Routes to School

Dear Ms. Schroeder:

We understand that the City of Auburn ("City") has received a letter of protest from Hansen Brothers Enterprises (Hansen) concerning the award of contract to Sierra Nevada Construction ("SNC") for the above-referenced project. The letter of protest appears to allege that SNC is not allowed to self-perform any traffic control for the project because of limitations in the Standard Specifications and California licensing laws. This letter addresses those concerns and should assuage any hesitancy of the City to award the project contract to SNC.

As the City has already determined based on its original recommendation by Staff to award the contract to SNC, SNC's bid, on its face, is responsive. Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information. *MCM Construction, Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 368.

The basis of Hansen's concerns appears to stem from two arguments: 1) SNC may not self-perform traffic control work per the bid documents; and, 2) SNC is not allowed to perform traffic control work pursuant to its Class A Contractor's License. As detailed below, these concerns do not prevent award of the contract to SNC because SNC will comply both with the State Contractor Licensing laws and the Standard Project Specifications.

First, Section 7-10.1 of the Standard Specifications referenced in the Protest Letter is very narrowly interpreted by Hansen. The reference to the Traffic Control portion of work is

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po box 50760, sparks, nv 89435  
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under a very broad heading of Traffic and Access. The language in the Specifications appears to be ensuring that anyone who performs the Traffic Control portion of work must be specialized in that item of work; or said another way, must be competent to execute that item of work. The interpretation by Hansen that only a subcontractor must perform this item of work is taken too literal as General Contractors often are vertically integrated and self-perform different portions of the work. SNC has self-performed traffic control for nearly all of its projects in the last several years. SNC has the skill and experience to execute the work on this project and any interpretation that the language is construed to only allow a subcontractor perform the work is a stretch of logic. Even if the City does feel that this language is not clear, it would still be the City's prerogative and best interest to waive the language as a minor irregularity and award the project to the lowest responsible bidder which in this case is SNC.

Secondly, Hansen's allegation that SNC is not licensed to self-perform this work is incorrect. As a "Class A" License Holder, SNC can perform many items of work. A Specialty Contractor License is provided to those who perform a limited classification of work. In this case, the C-31 License is provided to those contractors who exclusively perform traffic control work. SNC would not be required to obtain a C-31 License for traffic control as it would not be required to obtain a C-12 License for Earthwork and Paving because the A General Engineering License covers all items necessary for the completion of the General Engineering Classification.

In a nutshell, because SNC was the responsible low bidder for this project and all of the items in the Protest Letter have no merit, the City of Auburn should award the project to SNC. To the extent the City requires further information from SNC, we will be pleased to provide it upon reasonable request.

Sincerely,

Tim Morgan  
Sr. Estimator

northern nevada  
po box 50760, sparks, nv 89435  
2055 east greg street, sparks, nv 89431  
ph 775-355-0420 fax 775-355-0535

December 2, 2013

*Via Email*

[bschroeder@auburn.ca.gov](mailto:bschroeder@auburn.ca.gov)

Bernie Schroeder  
Director of Public Works  
City of Auburn  
1225 Lincoln Way  
Auburn, CA 95603

**RE: Response to Bid Protest**  
**Project: Palm Ave. Safe Routes to School**  
**Lowest Responsible Bidder: Sierra Nevada Construction, Inc.**

Ms. Schroeder:

This Firm represents Sierra Nevada Construction, Inc. ("SNC"), the lowest responsive, responsible bidder for the City of Auburn's ("City") Palm Avenue Safe Routes to School - Sidewalk and Bicycle Lane Project ("Project"). This letter is submitted in response to Hansen Bros. Enterprises' ("Hansen") attempted protest of the City's intended award of the subject contract to SNC. Contrary to Hansen's contentions, SNC's bid is responsive and SNC is capable and fully qualified to perform traffic control work for the Project. As such, the City's determination that SNC's bid is the lowest responsive bid is correct and Hansen's last minute protest, submitted on November 25, just hours before the City council was scheduled to approve an award of contract to SNC, should be denied.

On November 7, 2013, the City received and opened nine bids for the Project. After reviewing and evaluating those bids the City correctly determined that SNC was the lowest, responsive, responsible bidder, with a bid amount over \$82,000 less than the next lowest bidder, Hansen. Pursuant to City staff's written recommendation, the City council was prepared to approve an award of the contract to SNC at its regularly scheduled meeting on November 25, 2013. Prior to the meeting, however, Hansen submitted its letter purporting to protest award of the contract to SNC. Hansen argues that SNC is "incapable of self performing" traffic control work and that SNC failed to list a traffic control subcontractor in its bid. Hansen alleges that a traffic control subcontractor is required pursuant to City specifications, and that SNC is not itself qualified to perform traffic control work. Hansen is wrong.

Understandably, the City's Standard Specifications require all traffic control for City projects to be implemented by a traffic control specialist. SNC, in fact, has the unique and specialized skills and equipment to perform traffic control work for public works contracts and SNC has been

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Bernie Schroeder, Director of Public Works  
City of Auburn  
December 2, 2013  
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performing its own traffic control for its projects since 2001. Specifically, SNC employs a certified team of traffic control specialists who are responsible for developing and implementing traffic control for SNC's construction projects. SNC's employees include six certified Traffic Control Supervisors and three Traffic Control Technicians, each certified by the American Traffic Safety Services Association ("ATSSA"). In addition, SNC owns and operates eight traffic control trucks as well as associated traffic control equipment and devices including, for example, changeable message signs, arrow boards, signs, cones, etc. Thus, SNC has specialized traffic control personnel, specialized equipment to implement traffic control measures, and extensive experience performing traffic control on past roadway projects, including numerous projects for Caltrans as well as for local entities, such as the Cities of Rocklin and West Sacramento, and the County of Sacramento.

In light of SNC's specialized traffic control experience and expert personnel, SNC routinely self-performs traffic control work in lieu of subcontracting such work. Such is the case here, where SNC elected not to list a subcontractor for traffic control work. By not listing a subcontractor for traffic control work, SNC necessarily indicated its intention to self-perform such work and that it is qualified to perform that work. *See* Pub. Contr. Code § 4107. Whether SNC is capable of performing traffic control work is an issue of responsibility, not responsiveness. A bidder is "responsible" if it possesses "the fitness, quality, and capacity to perform the proposed work." *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867 (distinguishing "responsibility" from "responsiveness"). An agency has discretion to determine whether a low bidder is "responsible." *Id.* Here, in finding that SNC is the lowest "responsible" bidder, the City already correctly recognized that SNC has the appropriate capability and qualifications to perform the specialized traffic control work in this case.

SNC is a general engineering contractor, with a Class A general contractor's license. Hansen incorrectly asserts that SNC is required to hold a Class C-31 specialty license (Construction Zone Traffic Control) in order to perform traffic control work for this contract. Neither the City's specifications, nor the law, require a general engineering contractor to hold a specialty license classification in order to perform traffic control work in connection with a prime contract.

Section 7056 of the Business and Professions Code defines a general engineering contractor as one "whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill ...." The Legislature defined numerous "divisions or subjects" as falling within this Class A designation, including, among many others, "highways, streets and roads, ... land leveling and earthmoving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above-mentioned fixed works." Bus. & Prof. Code § 7056. Thus, the scope of a general engineering contractor's license encompasses many of the scopes of "specialty" trade licenses available to contractors who wish to specialize in only one area of contracting. For instance, the Class A license covers "earthmoving" and "paving" while a Class C-12 specialty license also covers "earthwork and paving." *See* 16 Cal. Code Regs. § 832.12. A Class A licensee expressly may perform "cement and concrete works" while a Class C-8 specialty contractor specializes as

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Bernie Schroeder, Director of Public Works  
City of Auburn  
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a "Concrete Contractor." 16 Cal. Code Regs. § 832.08. These, and other numerous examples demonstrate that a Class A general engineering contractor is authorized to perform a wide variety of scopes of work in connection with a project, including scopes of work that also may be covered by a specialty license.

Simply put, a licensed general contractor is not required to obtain specialty licenses for every possible type of work it may engage in while performing a prime contract. *See Chas. L. Harney, Inc. v. Contractors' State License Board*, 39 Cal.2d 561, 563 - 64 (1952); *Pacific Caisson & Shoring, Inc. v. Bernards Bros. Inc.*, 198 Cal.App.4th 681, 690 (2011); *Martin v. Mitchell Cement Contracting Co.*, 74 Cal.App.3d 15, 19 (1977); and 3 Cal.Op. Atty. Gen. 311, 312 - 13 (No. NS-5378, May 25, 1944) (discussing rights of and limitations on general and specialty contractors in taking various types of contracts). In considering whether the holder of a general contractor's license was required to subcontract specialty type work to a specialty contractor, California's Attorney General once opined:

If a person is licensed and classified as a general contractor, he can take a contract for construction business for any type of construction work or contract. ...

There is nothing in the contractors' license law which states the manner in which a contractor must accomplish the work, i.e., there is nothing to prevent him from doing all of the work himself, or of hiring, or contracting with, specialty contractors to do a certain part of the work.

3 Ops. Cal. Atty. Gen. 311, 312 - 313. Similarly here, nothing in Business and Professions Code section 7056 prevents a licensed general engineering contractor from performing any or all of the work that falls within the scope of the general engineering license classification.

Although traffic control work is not expressly identified, Section 7056 allows a contractor to perform traffic control work because such work requires specialized engineering skill and knowledge. Section 7056 "does not restrict the divisions or subjects of fixed work requiring the specialized skill of the Class A license." *Ron Yates Constr. Co. v. Sup. Ct.*, 186 Cal.App.3d 337, 346 (1986) (rejecting the argument that regulations restrict the scope work a general engineering contractor may perform); *Pac. Caisson & Shoring Inc. v. Bernards Bros., Inc.*, 198 Cal.App.4th 681, 689 (2011). Under California law, therefore, SNC need only hold a Class A license to perform the traffic control work on the Project.

Additionally, Hansen's interpretation of the City's Standard Specifications is narrow and wrong, as the City plainly did not intend to preclude a qualified bidder from self-performing traffic control work. Standard Specification, section 7-10.1 ("Section 7-10.1"), provides that "[a]ll traffic control on the project shall be implemented by a sub-contractor who specializes in Traffic Control and is approved by the Public Works Director and/or Engineer." That section itself, however, does not require bidders to "list" in their bids the contractor who will implement traffic control measures for the Project. Thus, a bid cannot be found "non-responsive" merely because

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Bernie Schroeder, Director of Public Works  
City of Auburn  
December 2, 2013  
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a traffic control contractor is not expressly identified. SNC's bid here, on its face, is responsive. It is not contrary to Section 7-10.1.

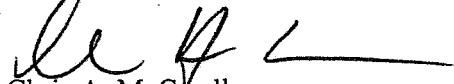
Section 7-10.1 reserves for the City the authority to approve the contractor who will implement the traffic control. Thus, the purpose of Section 7-10.1 is to provide the City with an added layer of assurance that whomever will implement traffic control measures on the Project will have the requisite skill and experience to perform that work. Section 7-10.1 does not preclude a bidder from acting as its own "sub-contractor" for the traffic control work. To the extent this standard specification section can be interpreted otherwise, as Hansen attempts to argue, the City has discretion to, and should waive such an interpretation as immaterial. *See MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal.App.4th 359, 374 (1998) (City has discretion to waive an inconsequential or immaterial irregularity).

Notably, SNC understands the City and Hansen previously have interpreted Section 7-10.1 as allowing self-performance of traffic control by a bidder in a similar City construction contract. Specifically, in 2011 Hansen was awarded a contract for the "Auburn Streetscape Phase 2 Project" ("Streetscape"). As demonstrated by the City's bid summary for the Streetscape project, a copy of which was provided to the City Council for its April 25, 2011 meeting, Hansen was the low bidder and, even though the value of traffic control item far exceeded the Public Contract Code subcontractor listing threshold, Hansen did not list a traffic control subcontractor. As SNC understands, Hansen self-performed the required traffic control work notwithstanding Section 7-10.1 (which also applied to that contract). Through the Streetscape contract, therefore, the City and Hansen previously demonstrated that Section 7-10.1 is correctly interpreted as allowing a bidder to self-perform traffic control work. Thus, Hansen should be estopped from arguing anything contrary here, and its protest should be denied for this reason too.

We understand the City intends to schedule the Project contract for consideration at the upcoming December 9, 2013 City Council meeting. For the reasons stated above, Hansen's late bid protest should be denied and the contract should be awarded to SNC as the lowest responsive, responsible bidder. Please contact us if you have any questions or if we can be of any further assistance to the City in its resolution of this matter.

Yours truly,

DIEPENBROCK ELKIN LLP



Chris A. McCandless  
Attorneys for Sierra Nevada Construction, Inc.

cc: Sierra Nevada Construction

{00404750; 2}

City of **Auburn**

1225 Lincoln Way, Auburn, CA 95603 • (530)823-4211 • FAX (530)885-5508  
www.auburn.ca.gov

December 2, 2013

Jeff Hanson  
Hansen Bros. Enterprises  
P. O. Box 1599  
Grass Valley, CA 95945

Re: Bid Protest; Palm Ave. Safe Routes to School Project

Dear Mr. Hansen,

We received your formal protest to awarding the Palm Avenue Safe Routes to Schools contract to Sierra Nevada Construction on November 25, 2013. As you know, we have postponed awarding the bid until after the Council has had an opportunity to consider and act upon your protest. The Council will do so at its December 9, 2013 meeting.

In addition to your protest letter and communications from the low bidder, the Public Works department will present the following information to the Council:

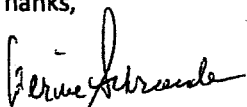
1. The requirement for subcontractors who perform traffic control to possess a C-31 license was inadvertently included in the bidding package, likely as a holdover from a prior agreement. We did not intend to include that particular requirement in this project, and if any bidder had asked, we would have waived the requirement as to all bidders.
2. The same C-31 license requirement was inadvertently included in a prior project (Streetscape 2) agreement as well, for which Hansen Brothers was the low bidder. Hansen Brothers did not itself possess a C-31 traffic control license, nor did it subcontract the work. Therefore, we understand that Hansen Brother's position as set forth in its protest letter is inconsistent with past practice.
3. The Public Works department interprets the C-31 license requirement to apply to subcontractors, in the event that the general contractor could not self-perform the work. A general contractor who possesses a "Class A" license may opt to perform traffic control itself, but if it chooses to subcontract traffic control, the subcontractor should be licensed to perform that work.
4. The City is authorized to waive minor defects in a bid, or requirements that are inconsequential to the overall project. An inconsequential requirement is one which is relatively minor, and which would not provide an unfair advantage over other bidders if it were waived. Assuming the provision was interpreted to require all bidders to list a C-31 licensed subcontractor for traffic control, the failure of one or more bidders to do so could be considered an inconsequential defect, waivable at the City's option.
5. There were nine bidders for the project, and only Hanson Bros listed a subcontractor for traffic control. Of the nine bidders whom all hold Class A, only one possesses a C-31 license.

"Endurance Capital of the World"

We will present all of this information to the Council, and they will carefully consider your protest. If you wish to retract your protest, please let us know in writing prior to the Council meeting. You are, of course, welcome to attend the meeting and address the Council regarding this, or any other matter within their jurisdiction.

Please let me know if you have any questions or additional concerns.

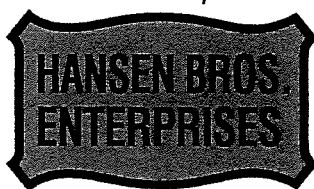
Thanks,

A handwritten signature in black ink, appearing to read "Bernie Schroeder". The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

Bernie Schroeder  
Director of Public Works

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December 3, 2013

Bernie Schroeder  
Director of Public Works  
City of Auburn  
1225 Lincoln Way  
Auburn, CA 95603

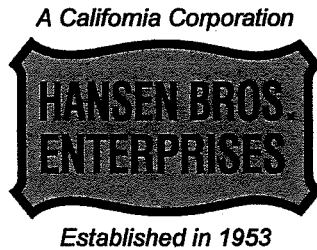
Re: Bid Protest - Palm Ave. Safe Routes to School Project

Ms. Schroeder,

After reviewing your response as well as Sierra Nevada Construction's and DIEPENBROCK ELKIN LLP, we have decided to proceed with our protest. We would like to address some of the points/issues brought up in your response and have this information presented to the board along with the original protest information.

1. "The requirement for subcontractors who perform traffic control to possess a C-31 license was inadvertently included in the bid package." This statement acknowledges that this was a requirement in the standard spec/bid package and accident or not it was a part of the spec/contract documents that we were required to bid by.
2. The fact that this was a requirement in the Streetscape 2 project is a moot point. Although some may feel the issue is worth debating and such discussion may be useful for future projects, it is irrelevant for the present issue. That project has been completed and signed off by the city. HBE should not be held responsible for an issue that was overlooked in 2011.
3. "The Public Works department interprets the C-31 license requirement to apply to subcontractors, in the event that the general contractor could not self perform the work. A general contractor who possesses a "Class A" license may opt to perform traffic control itself, but if it chooses to subcontract traffic control, the subcontractor should be licensed to perform that work." We understand that a general with a "Class A" license is more than capable of self performing traffic control, we self perform on many of our own projects. This however is not the issue that is being protested, the issue is that the City of Auburn standard specifications clearly state "All traffic control on the project shall be implemented (execute, carry out, perform) by a sub-contractor (a person/company hired by a general/prime/main contractor to perform a specific task as part of the overall project) who specializes (to limit your business or studies to one particular area) in Traffic Control." Sierra Nevada Construction did not name a subcontractor.

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(530) 272-5401 - Main Office Fax  
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(530) 346-8174 - Landscape/Masonry Yard  
(530) 346-8798 - Main Office Fax  
[www.gohbe.com](http://www.gohbe.com)

4. We feel that this issue is not a “minor defect” or “inconsequential” to the overall project. When a contractor is required to outsource a portion of a project that they would normally self perform on and another contractor is not, or does not, it gives an unfair advantage to the self performing contractor. The average total cost for traffic control between the eight other bidders on this project was \$136,724. Sierra Nevada Constructions cost for traffic control was \$22,405. An overall difference of \$114,319. The difference in cost between 1<sup>st</sup> and 2<sup>nd</sup> was \$81,993 and 1<sup>st</sup> and 3<sup>rd</sup> was \$89,007.
5. The fact that the other contractors did not list a traffic control sub does not overrule the fact that the standard specs provided by the City of Auburn section 7-10.1 clearly require it.

It has never been in question that Sierra Nevada Construction is capable of self performing traffic control, or if they employ the proper personnel to complete this task. We are well aware of their capabilities and of their licensing. We are also well aware that a “Class A” General Engineering incorporates many different aspects of work in the construction field. However, it does not make you a specialist in any one specific area and according to the specifications you must specialize, C-31(to limit your business or studies to one particular area) in the area of traffic control, not have it generally covered under a “Class A” license. Per the specifications a contractor is required to list any subcontractor performing more than ½ of one percent, or \$10,000, whichever is greater. By having a cost of \$22,405 listed for traffic control you would be required to list the company performing this task as a subcontractor. A general or prime contractor that holds only one license cannot subcontract to themselves to complete certain tasks of a project.

In response to our “last minute protest”, our protest was submitted to the City of Auburn within 2 hours of receiving the bid documents on November 25, 2013 at 12:01 pm. We had requested copies of the public bid documents on November 8, 2013 at 6:18 am and were told that the public documents were not going to be made available until a later date. Once we received the documents we responded in a timely manner given the circumstances.

Thank you,

Jeff Hansen  
Construction Manager/V.P.

**Chris A. McCandless**  
T: 916-492-5068  
F: 916-446-2640  
[cam@diepenbrock.com](mailto:cam@diepenbrock.com)  
[www.diepenbrock.com](http://www.diepenbrock.com)

December 4, 2013

***Via Email***

[bschroeder@auburn.ca.gov](mailto:bschroeder@auburn.ca.gov)

Bernie Schroeder  
Director of Public Works  
City of Auburn  
1225 Lincoln Way  
Auburn, CA 95603

**RE: Bid Protest**  
**Project: Palm Ave. Safe Routes to School**  
**Lowest Responsible Bidder: Sierra Nevada Construction, Inc.**

Ms. Schroeder:

We received a copy of Hansen Bros. Enterprises' ("Hansen") December 3, 2013 letter regarding its bid protest. On behalf of our client, Sierra Nevada Construction, Inc. ("SNC"), we provide the following reply for the City's consideration. We address each of Hansen's enumerated points in turn.

As to Hansen's first point, neither the bid documents nor the specifications ever expressly require a contractor to hold a C-31 license for traffic control work. While true that a contractor may obtain a C-31 license in order to perform traffic control work exclusively, as Hansen acknowledges, a Class A licensee also may perform traffic control work. Nothing in Standard Specification Section 7-10.1 ("Section 7-10.1") precludes the contractor who performs traffic control work from holding a Class A license instead of a C-31 license, as long as the contractor's "principal contracting business" comports with Section 7056 of the Business and Professions Code. Here, the issue is not whether a specialty traffic control subcontractor must possess a C-31 license - plainly such a subcontractor is required to hold a C-31 license. The issue here is whether Section 7-10.1 is correctly interpreted as allowing self-performance of the traffic control work. It is, as demonstrated by Hansen's and the City's prior interpretation of this specification section as well as other bidders for this project.

As to Hansen's second point, the Streetscape 2 project information is not "moot." The history of the City's (and Hansen's) interpretation of Section 7-10.1 demonstrates for all bidders how the City interprets its standard specifications, and what meaning it intends for its contract provision. Bidders are entitled to rely on the City's past interpretations, particularly in the event there is any arguable ambiguity in a specification, as here. Here, Hansen previously interpreted Section 7-10.1 as allowing a bidder to self-perform traffic control work for the City and the City agrees.

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This is published, public information, and it would be unfair for the City (and Hansen) to argue Section 7-10.1 has any contrary meaning than as applied publicly in the past. Moreover, the fact that Hansen interpreted Section 7-10.1 as allowing it to self-perform traffic control for the Streetscape 2 contract, and Hansen now argues for a contrary interpretation, demonstrates ambiguity in the specification and, more significantly, that Hansen now questions how this specification section might be applied. Hansen had ample opportunity to request clarification from the City prior to its bid and it failed to do so. Indeed, if Hansen believed the City and it had interpreted and applied the specifications incorrectly in the past, Hansen was obligated to seek further interpretation of the contract documents pursuant to Sections B1.01 and B1.04. Because Hansen did not seek clarification, its protest should be denied on this ground too. Hansen waived its argument by keeping its alternate interpretation of Section 7-10.1 to itself, and then waiting until after bid opening before raising its new interpretation. The purpose of requiring bidders to identify questions and potential ambiguities in bid documents in advance is to avoid a "gotcha" protest like this.

As to Hansen's third point, Hansen first acknowledges that its protest is not based on SNC's ability to perform traffic control work, or that a Class A licensee may self-perform traffic control work without a C-31 license. Hansen's point here is to reiterate its argument that Section 7-10.1 should be interpreted as precluding any bidder from choosing to self-perform traffic control work. As previously explained, Hansen's interpretation is far too narrow and contrary to its own past dealings with the City. Hansen also attempts to self-define certain terms in Section 7-10.1, arguing, for instance, that "specializes" must mean a business is "limited" to one particular area. This is not true. Nothing precludes a business from "specializing" in more than one area. To the extent Hansen questioned these terms, it should have raised its questions before bid opening.

Notably, Section 7-10.1 identifies both a "contractor" and a "sub-contractor" as performing traffic control. That is, in the first paragraph of Section 7-10.1, the City provides: "The Contractor will be required to maintain at least one lane of traffic in each direction ...." Later, in the second paragraph, the City provides for the traffic control implementation "by a sub-contractor who specializes in Traffic Control ...." To the extent that Hansen now believes this Section precludes the "Contractor" from self-performing traffic control, the reference to both the "Contractor" and a "sub-contractor" also demonstrates ambiguity that Hansen should have raised long before bid opening.

As to Hansen's fourth point, there is no "unfair advantage," particularly where Hansen knew prior to its bid that the City interprets Section 7-10.1 as allowing prime contractors to self-perform the traffic control work. Further, Hansen's attempt to compare bid item prices, and its pure speculation over the meaning of price differences also is unpersuasive. Contractors each have different means and methods they employ in preparing bids and in performing work and it is, therefore, impossible to compare mere line item dollar amounts and conclude a bidder has a cost advantage. A price for traffic control depends on many variables not seen on the face of a bid sheet. For instance, the number of days a bidder estimates needing traffic control is not disclosed in a bid item value. One bidder may estimate it can perform the same work in fewer



## **DIEPENBROCK ELKIN LLP**

Bernie Schroeder, Director of Public Works  
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December 4, 2013  
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days, thereby including a lower item price for traffic control. Thus, without comparing all such variables, Hansen merely speculates as to the meaning of listed values. The City should avoid looking into the bidder's means and methods in an attempt to compare true costs.

As explained previously, the purpose of Section 7-10.1 is to provide the City with an added layer of assurance that whomever will implement traffic control measures will have the requisite skill and experience to perform that work and nothing in Section 7-10.1 expressly precludes a bidder from acting as its own "sub-contractor." Particularly here, where the City has interpreted and applied this section as allowing self-performance of traffic control work, the City plainly has discretion to, and should waive this issue as immaterial.

Finally, Hansen points out that other contractors, like SNC, intended to self-perform traffic control work. This demonstrates that Section 7-10.1 is reasonably interpreted by bidders, and/or actually known by bidders to allow self-performance of traffic control. Hansen too knew this prior to bid time. If it thought otherwise, Hansen was obligated to raise it before bids were submitted, and not wait to see the results before asserting the issue for the first time in a protest.

For these reasons, and those stated in our December 1, 2013 letter, Hansen's bid protest should be denied and the contract should be awarded to SNC as the lowest responsive, responsible bidder. Please contact us if you have any questions or if we can be of any further assistance to the City in its resolution of this matter.

Yours truly,

**DIEPENBROCK ELKIN LLP**

Chris A. McCandless  
Attorneys for Sierra Nevada Construction, Inc.

cc: Sierra Nevada Construction



# Memorandum

City of Auburn  
Public Works Department

By: Bernie Schroeder, Public Works Director

Date: December 4, 2013

Subject: Palm Avenue - Safe Routes to School

| No. | TASK   | BEGIN          | COMPLETION              | LEAD         |
|-----|--|----------------|-------------------------|--------------|
| 1   | Review/Revise Bid Package                            | August 8, 2013 |                         | GS/EH        |
| 2   | Environmental Review                                 |                | May 15, 2013            | Reg Murray   |
| 3   | <b>City Council Permission to Advertise</b>          |                | <b>May 15, 2013</b>     | GS/CH        |
| 4   | Staff report to City Manager                         |                |                         | GS/EH        |
| 5   | Notice to Contractors to paper                       |                | September 24, 2013      | EH/GS        |
|     | <i>Set 1st published date for September 27, 2013</i> |                |                         |              |
|     | <i>Set 2nd published date for October 7, 2013</i>    |                |                         |              |
|     | <i>Set 3rd published date for Oct 15, 2013</i>       |                |                         |              |
| 6   | Pre-bid meeting: City Hall, Room 10, 2:00 pm         |                | October 16, 2013        | BKS/RK/EH    |
| 7   | Bid Opening: City Hall, Room 8, 2:00 pm              |                | November 7, 2013        | BKS/EH/GS/MS |
| 8   | <b>City Council Award of Project</b>                 |                | <b>December 9, 2013</b> |              |
| 9   | Staff report to City Manager                         |                | December 4, 2013        | BKS          |
| 10  | Tentative Notice to Proceed                          |                | January 6, 2014         | BKS          |
| 11  | Construction of Project (100 working days)           |                | May 25, 2014            |              |
| 12  | <b>Project Complete</b>                              |                | <b>July 1, 2014</b>     |              |

RESOLUTION NO. 013-

RESOLUTION TO AUTHORIZE THE AWARD OF BID TO SIERRA NEVADA  
CONSTRUCTION, INC. FOR THE SAFE ROUTES TO SCHOOL – PALM AVE  
SIDEWALK PROJECT

-----  
THE CITY COUNCIL OF THE CITY OF AUBURN DOES HEREBY RESOLVE:

1. That all protests to the low bid for this project have been considered, and the Council hereby rejects them.
2. That the City Council of the City of Auburn does authorize the Director of Public Works to execute a construction contract with Sierra Nevada Construction, Inc. for the Safe Routes to School – Palm Ave Sidewalk Project in an amount not to exceed \$1,494,907.70.
3. That the City Council does authorize the Director of Public Works to amend the budget for the Palm Avenue Sidewalk Project to appropriate \$100,000 in Highway 49 Mitigation Funds and \$175,631 in Local Transportation Funds in the Transportation Fund.

DATED: December 9, 2013

\_\_\_\_\_  
Kevin Hanley, Mayor

ATTEST:

\_\_\_\_\_  
Stephanie L. Snyder, City Clerk

I, Stephanie L. Snyder, City Clerk of the City of Auburn, hereby certify that the foregoing resolution was duly passed at a regular session meeting of

1 the City Council of the City of Auburn held on the 9th day of December 2013  
2 by the following vote on roll call:

3 Ayes:

4 Noes:

5 Absent:

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Stephanie L. Snyder, City Clerk